SUPREME COURT, U. S.

FILED

APR 11 1969

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 1251

UNITED FOREST PRODUCTS CO., INC.,
Petitioner,

vs.

EARL R. BAXTER, WILLEYNE BAXTER, LYNN O. MUSE, RICHARD L. KING, and W. K. CASH,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Reports below. The opinion of the court below has not yet been reported.

Jurisdictional grounds. The judgment sought to be reviewed was entered on February 3, 1969. The Petition for Rehearing was denied on February 25, 1969. This Court has jurisdiction to review the judgment in question by writ of certiorari, pursuant to Title 28, U.S.C., Section 1254(1).

Questions presented for review:

1. **Whether the court of appeals had jurisdiction to review (before final judgment below, and without certification pursuant to Title 28, U.S.C., Section 1292(b) an order entered by the district court, under Federal Rule of Civil Procedure 67, allowing petitioner to deposit in court the installment payments on a stock purchase agreement, pending trial of petitioner's action for damages against respondents by reason of fraud in connection with such sale. Petitioner contends that the court of appeals erred in reviewing such order under the so-called "collateral order" doctrine.**

2. **Whether the district court had power to enter the order for deposit of funds. Petitioner contends that the district court had authority to enter such order in aid of its jurisdiction under Title 28, U.S.C., Section 1651, and under its inherent powers as a court, all as specifically provided for in Federal Rule of Civil Procedure 67. Petitioner contends that the court of appeals erred in holding that the district court's power is circumscribed by a straitjacket of inelastic state provisional remedies incorporated by Federal Rule of Civil Procedure 64.**

Statutes and rules involved in the case:

Title 28, U.S.C., Section 1291, Final decisions of district courts:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Title 28, U.S.C., Section 1651, Writs:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

Federal Rule of Civil Procedure 67, Deposit in Court:

"In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing. Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of Title 28, U.S.C., §§ 2041, and 2042; the Act of June 26, 1934, c. 756, § 23, as amended (48 Stat. 1236, 58 Stat. 845), U.S.C., Title 31, § 725v; or any like statute."

Federal Rule of Civil Procedure 64, Seizure of Person or Property:

"At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus

available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action."

Statement of the case. United Forest Products Co., Inc. (United Forest), is one of, and sales agent for, a group of corporations under common management headquartered in northern California. Prior to the events related herein, these companies had been engaged for many years in the business of cutting timber, operating a sawmill, and manufacturing specialized wood products; the chief product being box shook (components for wooden boxes cut to size).

Baxter Lumber Co. was a producer of wooden ammunition boxes. As of February, 1967, it had plants in Iowa and Texas, and was ready to open a plant in Tennessee. The office was at Centerville, Iowa. Earl R. Baxter and his wife, Willeyne, owned jointly 48% of the stock. Virgil Baxter, Lynn Muse and Richard King each owned 16%, and W. K. Cash owned 4%.

Earl Baxter and Lynn Muse, acting for the other shareholders, interested the management of United Forest in purchasing the corporate stock of Baxter Lumber Co. The physical assets of Baxter Lumber Co. were of relatively little value, and were heavily encumbered. The principal encumbrances that were revealed to the prospective purchasers were a Small Business Administration loan of $124,000, and an obligation to Earl Baxter of $324,000 under a conditional sales contract (then in default), relating back to a prior sale of assets to the corporation. Because of the burgeoning demand brought about by the war in Viet Nam, Baxter Lumber Co. had

accumulated a large quantity of orders from the operators of government arsenals. These orders were represented to be in the amount of $11,000,000 involving production of 2,700,000 boxes. Relying on representations of Earl Baxter and Lynn Muse as to various facts from which conclusions were drawn as to the value of the stock (based mainly on the assumed profitability in the orders on hand), the management of United Forest was induced to enter into an agreement for the purchase of the stock of Baxter Lumber Co. This agreement was executed in February, 1967 and was revised somewhat in April, 1967. It required the purchasers to cause the above mentioned S.B.A. loan, the debt to Earl Baxter, and other debts of the corporation to the selling shareholders to be paid, and required United Forest to make further investments in Baxter Lumber Co. It provided for a total purchase price of $2,180,000, payable in four installments, as follows: $580,000 due August 31, 1967; $500,000 due January 31, 1968; $500,000 due June 30, 1968; $600,000 due November 1, 1968.

Under the agreement, United Forest took possession of and assumed management of Baxter Lumber Co. By the time the first installment payment was due, it had become apparent that serious misrepresentations had been made by the selling shareholders, and that the stock of Baxter Lumber Co. was worth much less at the time of the sale than had been represented. But by this time United Forest had invested in Baxter Lumber Co. to such an extent, and it and its affiliated corporations had made such great changes in their operations in California by reason of the Baxter acquisition, that rescission of the stock purchase agreement was not feasible. Hence, an action for damages resulting from the fraud was filed in the United States District Court for the Southern Dis-

trict of Iowa in August of 1967, in which United Forest sought actual damages of $1,180,000 plus exemplary damages. Jurisdiction was based on diversity of citizenship, United Forest being a California corporation and the defendants being citizens of Iowa, Texas and Arkansas. All defendants appeared personally and made answer to the complaint.

As part of its complaint, United Forest requested leave of the district court, pursuant to Federal Rule of Civil Procedure 67, to deposit the payment of $580,000 due August 31, 1967, into the registry of the court pending final determination of the case on its merits. This application was resisted by the defendants, who contended that United Forest should be required to follow Iowa attachment procedure, which compels an attaching plaintiff to post a bond in double the value of the property attached, against which recovery may be had in the event of a wrongful attachment. Iowa Code, 1966, Chapter 639.

After discussion between court and counsel as to the measure of damages in Iowa in a case of wrongful attachment, it was determined that United Forest should be allowed to deposit the initial payment of $580,000, plus interest on same for one year at 6% (the amount of interest agreed upon in the contract), plus the sum of $10,000 as a contingency for possible attorneys' fees and expenses that might be awarded to defendants on a theory akin to wrongful attachment. An order so providing was entered, which order provided that the funds should be deposited at interest in a local bank.[1]

1. "Now on this 30th day of August, 1967, this matter coming on for hearing upon Plaintiff's request for leave to deposit funds stated in its Complaint, and the Court having heard the evidence submitted by the parties and having considered the briefs and arguments of counsel for all of the parties to this action, and

The defendants thereafter moved the court for an order for disbursement of the funds that had been deposited, and for an order placing Baxter Lumber Co. in receivership. United Forest resisted these motions and moved for an order granting leave to deposit the payment of $500,000 due January 31, 1968 in court. A lengthy hearing was held in December, 1967, at the conclusion of which the district court stated, during oral argument:

> "In the last three days, the Court has heard considerably more evidence about this case. I am more familiar with it, and there is more evidence before the Court as to what occurred. I want to express this caution, however, that anything I say now should not be construed in any way as the Court's determination on the merits, because I recognize that in a hearing such as this where we have before us the

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being fully advised, finds that Plaintiff's request for leave to deposit funds should be granted subject to the following conditions:

1. The sum of $580,000.00, being the amount due under the contract on August 31, 1967, shall be deposited, plus an additional sum of $44,800.00, which additional sum shall be held as security for such right of action, if any, as the individual Defendants might have under Iowa law for wrongful attachment, which right of action is asserted by the individual Defendants and specifically denied by the Plaintiff.

2. Said funds shall be deposited with Iowa-Des Moines National Bank or such other depository as approved by the Court.

3. Plaintiff shall be entitled to withdraw any interest accruing on said deposit at appropriate intervals after first securing an order from this Court allowing such withdrawal.

4. The funds so deposited shall be held by the depositary until further order of the Court, and the certificate of deposit or other evidence of such deposit shall be held in safekeeping by the depositary until further order of the Court.

5. The certificates of stock of Baxter Lumber Company presently being held by the Centerville National Bank, Centerville, Iowa, as escrow holder under the contract, shall be retained by said escrow holder until further order of the Court.

6. A certified copy of this Order shall be delivered to the above mentioned depositary and to Centerville National Bank.

7. The Court will entertain a motion by any party for a termination or modification of this Order upon a showing of change of circumstances sufficient to justify such relief." (R. pp. 85-86).

> problem of receivership, the problem of whether a financial advisor should be appointed, and the problem of whether or not funds should be further impounded, or the ones now on hand be disbursed, that counsel naturally did not introduce evidence which they might introduce in a trial of the merits, and therefore, this Court makes no finding as to the merits of this cause; that is, the ultimate cause—the dispute between these parties. *The Court is convinced, however, that on the whole record there is abundant evidence that at least some misrepresentation was made in connection with this sale, and that the matter of damages may be substantial.*" (Emphasis supplied) (R. p. 321).

The court concluded that since there was no evidence of personal participation in the misrepresentations by the defendants other than Earl Baxter and Lynn Muse, it would be unlikely that exemplary damages could be awarded against such other defendants, and, therefore, the shares accruing to the defendants other than Earl Baxter and Lynn Muse of the first two installment payments should be paid over forthwith. As respects Earl Baxter and Lynn Muse, however, the court concluded that their share of the first two payments should be held on deposit. In this connection, the order entered by the court referred specifically to substantial evidence of misconduct and misrepresentations on the part of these two defendants such as might well be grounds for an award of exemplary damages against them, as well as actual damages.[2]

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2. "The Court finds that, upon the showing made prior to entry of its previous Order re Deposit of Funds, sufficient grounds existed for the entry of such order, and continue to exist as to the installment payments made and to be made in respect of the stock held by Earl R. Baxter and Willeyene Baxter and the stock held by Lynn O. Muse. *In this connection the Court finds that there is substantial evidence which indicates that the defendant Earl R. Baxter and Lynn O. Muse were guilty of misconduct and misrepresentations of such a nature that in addition to actual damages*

The defendants (with the exception of Virgil Baxter) appealed to the United States Court of Appeals for the Eighth Circuit from the second order of the district court. They sought and were denied leave for an interlocutory appeal under Title 28, U.S.C., Section 1292(b). They then asked review under the "collateral order" exception to the final decision requirement of 28 U.S.C., Section 1291, contending that the district court was without power to enter the order of which they complained. Your petitioner contended that the order of the trial court was

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there might well be awarded against them exemplary damages, all as explained in the remarks of the Court at the close of the hearing and during argument by counsel. The Court now finds, however, that in view of the further evidence adduced, and the improbability of an award of exemplary damages against defendants Virgil Baxter, Richard King and W. K. Cash, the Court should now order release of that portion of the August 31, 1967 payment of $580,000.00 payable in respect of the shares of said defendants. Such payment shall be accomplished in the manner stated in the Order for Release of Certain Funds and for Payment and Deposit of Certain Funds, entered contemporaneously herewith.

The Court further finds that the portion of the $500,000.00 payment due from plaintiff on or before January 31, 1968 which is payable in respect of the stock owned by the three defendants last mentioned above shall be paid in the manner set out in said Order, and the balance shall be deposited in Iowa-Des Moines National Bank, as depositary, to be held by it pending further order of this Court.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that the motions of defendants for appointment of a receiver and for appointment of a fiscal agent be and the same are hereby denied.

It is further ordered that defendants' motions for disbursement of deposit are sustained in part and denied in part, as specified above, and as set out in the Order for Release of Certain Funds and for Payment and Deposit of Certain Funds entered contemporaneously herewith.

It is further ordered that plaintiff's request for leave to deposit additional funds is likewise sustained in part and denied in part, as specified above, and as set out in said Order.

Dated this 28th day of December, 1967.

/s/ Roy L. Stephenson
Chief Judge."

(Emphasis supplied) (Supp. R. pp. 2-3).

not appealable under the "collateral order" exception to the general rule, and that in any event the order of the district court was within its jurisdiction and was right. The case was submitted to the court of appeals in December, 1968. By this time, United Forest had applied for, and the district court had entered, orders allowing deposit of the final two installment payments. The complaining defendants did not request a hearing on either of these orders, nor did they make a serious effort to have the district court provide additional "security" in the event of "wrongful attachment." Nevertheless, United Forest voluntarily requested, and the district court ordered, that a sum in addition to that required as the final payment on the contract be deposited which (with the interest theretofore accrued and expected to be earned in the future on the deposited funds) would provide for all principal and interest up to November 16, 1969.

The opinion of the court of appeals holding the matter to be appealable under the "collateral order" exception, and vacating the order of the district court for lack of jurisdiction, was entered February 3, 1969. A copy of the opinion is attached. Your petitioner asked the court of appeals to rehear this decision, and its petition was denied. An order has been entered staying the mandate of the court of appeals until final disposition by the Supreme Court. The main case is still pending trial in the district court, and as recently as March 3, 1969, respondents applied for and obtained an order from the district court granting them until July 1, 1969, to complete discovery and make further report to the court.

ARGUMENT

I. **The order of the district court was not appealable.** The decision of the court of appeals grossly misconceives and misapplies the "collateral order" exception to the statutory requirement, set out in Title 28, U.S.C., Section 1291, that there be a "final decision" in the district court before the court of appeals can entertain an appeal. In so doing, the court of appeals has rendered a decision in conflict with the applicable decisions of this Court (discussed infra), those of other courts of appeals,[3] and even its own prior decisions.[4] For this reason, and also because the action of the court of appeals so far departs from the accepted and usual course of judicial proceedings that this case cries for an exercise of the Supreme Court's power of supervision, this petition satisfies the criteria governing review on certiorari listed in Supreme Court Rule 19(1)(b). In fact, as we shall show, the decision of the court of appeals encourages the very evil that the collateral order doctrine was conceived and designed to prevent, thus making it imperative that this Court grant the writ.

The court of appeals placed principal reliance on *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, where the Court held that the defendants in a complex stockholders' derivative action could appeal from an order of the district court refusing to require the plaintiffs to post security for expenses of suit and counsel fees, saying (337 U.S. at 546):

> "This decision appears to fall in that *small class* which finally determine claims of right separable from, and

3. See, *e.g.*, *Flegenheimer* v. *General Mills*, (2nd Cir. 1951) 191 F.2d 237.

4. *Florida* v. *United States*, (8th Cir. 1960) 285 F.2d 596; *Smith* v. *Sherman*, (8th Cir. 1965) 349 F.2d 547.

> collateral to, rights asserted in the action, *too important to be denied review* and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." (Emphasis supplied).

But what is it about the asserted collateral right that makes it "too important to be denied review"? A study of the cases demonstrates that the element that gives the asserted right such importance is the danger that the money will be gone, or the property dissipated, or substantial rights irrevocably lost, if immediate appeal is not granted and the party is compelled to await final disposition of the entire case. Where the order of the trial court is directed toward preserving the status quo, and conserving and protecting disputed money or property, as in the present case, the collateral order exception does not apply, and an appeal prior to final judgment does not lie. This Court has consistently so held.

Forgay v. *Conrad,* 47 U.S. 201, the forerunner of the collateral order doctrine, was an action to set aside various deeds of lands and slaves owned by a bankrupt. The Court held that an order setting the same aside and directing immediate conveyance of the property to the assignee in bankruptcy, could be appealed, even though the lower court had reserved its decision on the final accounting. The reason for considering such order to be "final" for purposes of review was that otherwise the appellants would be subject to irreparable injury. The Court said (47 U.S. 204):

> "If these appellants, therefore, must wait until the accounts are reported by the master and confirmed by the court, they will be subjected to *irreparable injury.* For the lands and slaves which they claim will be taken out of their possession and sold, and the

> proceeds distributed among the creditors of the bankrupt, before they can have an opportunity of being heard in this court in defense of their rights." (Emphasis supplied).

The Court then distinguished such a situation as existed in the present case before the court of appeals took jurisdiction, saying (47 U.S. 204-5):

> *"This rule, of course, does not extend to cases where money is directed to be paid into court,* or property to be delivered to a receiver, or property held in trust to be delivered to a new trustee appointed by the court, or to cases of a like description. Orders of that kind are frequently and necessarily made in the progress of a cause. But they are interlocutory only, and intended to preserve the subject matter in dispute from waste or dilapidation, and to keep it within the control of the court until the rights of the parties concerned can be adjudicated by a final decree." (Emphasis supplied).

To like effect see, *Louisiana National Bank* v. *Whitney,* 121 U.S. 285; Annotation, Appealability of Order Directing Payment of Money into Court, 15 A.L.R. 3d 568, 570-1.

A ruling of the circuit court dismissing an appeal from an order of the district court requiring the payment of money into court was approved and affirmed in *Cushing* v. *Laird,* 107 U.S. 69. The continued vitality of *Cushing* v. *Laird* was recognized in *Swift & Co.* v. *Compania Colombiana del Caribe,* 339 U.S. 684. In the *Compania Colombiana* case, a ship had been attached to secure a claim in admiralty. The district court *vacated* the attachment. In holding that the order vacating the attachment was appealable under the *Cohen* rule, the Court said (339 U.S. 689):

> "Appellate review of the order *dissolving* the attachment at a later date would be an empty rite after the

> vessel had been released and the restoration of the attachment only theoretically possible. * * * *The situation is quite different where an attachment is upheld pending determination of the principal claim.* Such was *Cushing* v. *Laird,* 107 U.S. 69, 27 L.Ed. 391, 2 S.Ct. 196, which is urged on us. In such a situation the rights of all the parties can be adequately protected while the litigation on the main claim proceeds." (Emphasis supplied).

See also, Judge Learned Hand's excellent discussion in *Flegenheimer* v. *General Mills,* (2nd Cir. 1951) 191 F.2d 237, and 6 Moore's Federal Practice, 2nd Edition, Paragraph 54.14, where the author states (pages 137-8):

> "Where an attachment or garnishment in a quasi in rem action is *upheld* pending determination of the main cause of action the order is interlocutory and *non-appealable* at that time. *Here the potential factor of irreparable injury, present in the Cohen case, supra, is either absent or too insubstantial.* An order *vacating* the attachment or garnishment is, however, quite different: *the potential factor of irreparable injury is quite real if appellate review is postponed and the order is, accordingly, held appealable."* (Emphasis supplied).

To the same effect see *DiBella* v. *United States,* 369 U.S. 121, 126, where the Court also notes that despite the exceptions:

> "The final judgment rule is the dominant rule in federal appellate practice."

The decision of the court of appeals is directly in conflict with the above cited holdings of the Supreme Court and other authorities indicating that an order directing the payment of money into court is not appealable. The collateral order doctrine, which was created to serve the salutary purpose of preventing irreparable injury, has

here been perverted by the court of appeals so as to make irreparable injury quite likely. For if the installment payments presently impounded are delivered into the hands of those with reference to whom the trial court found

> "there is substantial evidence * * * of misconduct and misrepresentations of such a nature that in addition to actual damages there might well be awarded against them exemplary damages * * *"

(see Footnote 2, supra), and most of whom are non-residents of the jurisdiction, one would have to be quite naive to assume that the funds will be available and subject to execution when judgment is finally rendered in the trial court.

The court of appeals acted contrary to the instructions of this Court in failing to require the complaining defendants to show irreparable injury as a condition of appeal. The decision of the court of appeals (page A4) pays lip service to this requirement, but ignores it thereafter, referring only to various provisions of the Iowa law of attachment. The complaining defendants could not establish any irreparable injury, and made no serious effort to do so. As previously noted, the trial court imposed, as a condition for allowing the first installment to be deposited, that United Forest deposit, in addition to the installment payment, one year's interest ($34,800) plus a reasonable sum as agreed on by counsel for possible attorneys' fees ($10,000). This was done. All sums deposited have drawn interest at the highest interest rates obtainable, and none of the interest has been withdrawn. The final installment payment, due November 1, 1968, was scheduled to be $600,000, but the court's order required United Forest to deposit $710,000 and ordered the depositary to invest it in a 90 day certificate of deposit at the highest interest rate obtainable, and to do likewise with

each previous deposit as the several certificates mature. (See Exhibit A to United Forest's Petition for Rehearing below). The orders of the district court allowing deposit of funds do not purport to have any degree of finality. The trial court repeatedly emphasized that they were subject to modification upon request of any party. (R. pp. 49-53, 73-83, 86, 157, 315-325).

Under Iowa law, damages for wrongful attachment are limited to "actual damages" (which in the case of detention of money is interest on the money), attorneys fees incurred in connection with securing the release of the property, and exemplary damages if it is shown that the attachment was sued out maliciously.[5] We submit that the amount presently on deposit is more than adequate to secure defendants for any sum that they might conceivably obtain as damages under a theory akin to wrongful attachment. This fund is fully as sufficient to protect defendants as to this asserted right as an attachment bond would have been.

Here, United Forest was not attempting to avoid a deposit of security, as in *Cohen*. Here, the property is not likely to sail away, as in *Compania Colombiana*. The only real dispute that was tendered to the court of appeals was as to the method of providing security and the amount thereof. As to the method, we submit that no irreparable injury can be found in the fact that the security was in the form of cash in the bank, drawing interest, rather than an attachment bond. This leaves only an argument as to the *amount* of the security—the defendants contending that it should be double the value of the property attached, as provided in the Iowa attachment statute, and

5. Iowa Code, 1966, Section 639.14; *Shriver* v. *Frawley*, 167 Iowa 419, 149 N.W. 510; *Dorr Cattle Co.* v. *Des Moines National Bank*, 127 Iowa 153, 98 N.W. 918; *Sadler* v. *Bean*, 38 Iowa 684.

the trial court, more realistically, ruling that a sum of money large enough to cover all damages which defendants might be able to recover on a theory akin to wrongful attachment is sufficient.

A dispute as to the *amount* of security, as distinguished from the *right* to require security, is not appealable under the collateral order exception. This was recognized in the *Cohen* case, where the Court said (337 U.S. 547):

> "But we do not mean that every order fixing security is subject to appeal. Here it is the *right* to security that presents a serious and unsettled question. If the *right* were admitted or clear and the order involved only an exercise of discretion as to the *amount* of security, a matter the statute makes subject to reconsideration from time to time, appealability would present a different question." (Emphasis supplied).

Here there was no bona fide dispute as to an important *right*, as distinguished from a controversy involving the district court's *discretion*, within the scope of this distinction. As noted, the *Cohen* case involved the question of the *right* of the defendants to require the plaintiff to deposit security as a condition of maintaining a derivative action. In the present case, the plaintiff did not dispute the *right* of the defendants to demand that security be posted as a condition to the deposit of the funds.[6] Thus, the problem that existed in the *Cohen* case did not exist when this matter was presented to the court of appeals.

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6. United Forest disputed defendants' contentions that defendants might have a right of action on a theory akin to wrongful attachment if the order for deposit were granted, but United Forest did not contest the power of the court to order the deposit of additional funds as security for such claimed right. The basis for calculation of such additional deposit was the subject of discussion between court and counsel (R. pp. 77-85), and the first order for deposit provided for deposit of the additional sum agreed upon. See Footnote 1, supra.

Nor was there any bona fide contest as to the right of the plaintiff to cause the funds to be tied up during the progress of the litigation. It was conceded by counsel for the defendants that the plaintiff would have had the right of attachment under Iowa law.[7] Indeed, the right of plaintiff to attach under Iowa law was so clear that it was not even argued in the briefs submitted to the courts below. Iowa Code, 1966, Section 639.3 lists the grounds that must be stated in the petition for attachment. One ground is that the defendant "is a nonresident of the state." This ground applies as to all defendants other than Lynn Muse and W. K. Cash. Another ground listed in Section 639.3 is "that the debt is due for property obtained under false pretenses." The Iowa court has held that a claim for damages resulting from false representations in the sale of property is one for property "obtained under false pretenses" within the meaning of this provision, and the right of attachment exists as to such claim. *Stanhope* v. *Swafford*, 77 Iowa 594, 42 N.W. 450.

Since there was no bona fide dispute below as to the right of United Forest to cause the funds to be tied up pending final determination of the main case, nor as to the right of defendants to demand that security be posted

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7. At the hearing on the first request for leave to deposit funds, the following exchange occurred between the court and Mr. Wine, counsel for the defendants (R. pp. 41-2):

> THE COURT: Let me ask you this question. Supposing that I turned them down on this—they can pay this $500,000 into the bank and then attach it, can't they?
>
> MR. WINE: Yes, sir. And that we say we (sic—should be "they") have a right to do under the bond—attach it under the bond. The law of attachment we think is applicable here. If there's a danger this money may escape, they may go down and attach this money under bond, so that if we have been injured and we were entitled to this money and it was wrongfully attached, which we believe, that we may be compensated for the damages they caused, and we are certainly willing to stipulate in this court that we will give them plenty of time to get their attachment handled if that's what they want to do. We are not going to try and run down and get the money.

for their claimed right of action for damages by reason of the tying up of the funds, and since the only real dispute between the parties related to the amount of the security, the *Cohen* test was not met. The action of the court of appeals in allowing this appeal was seriously in conflict with the long-standing rules of this Court. The effect of the decision of the court of appeals has been to cause the disputed funds to be now placed in jeopardy of dissipation. Thus, in its *present* posture, the case is in much the same position as were such cases as *Compania Colombiana* and *Cohen* when they came before this Court. This incorrect and inverse application of the collateral order doctrine, so as to create jeopardy of great injury (where before all was secure), should not be allowed to stand. The writ should be granted.

II. **The decision below misconstrues and unduly restricts the power of the district court to allow a deposit of funds. Certiorari should be granted to correct this error and to clarify the district court's authority in this regard.** The decision of the court of appeals points up a conflict between decisions emanating from courts in different circuits.[8] Most of the reported decisions involving Federal Rule of Civil Procedure 67 have been by district courts. This is doubtless due to the fact that appeals are seldom attempted from interlocutory, discretionary orders such as these. But the proper application of Rule 67, its relation to Rule 64, and the bearing of these rules on the power of the district court, inherently and under Title 28, U.S.C., Section 1651, are important questions of federal law that

8. Compare, *Fouch* v. *Rollins*, (D.C. Alaska 1956) 146 F.Supp. 87, allowing deposit of funds, with *General Pencil Co.* v. *George N. Kahn Co.*, (S.D. N.Y. 1965) 246 F.Supp. 60 and *Dinkins* v. *General Aniline & Film Corp.*, (S.D. N.Y. 1963) 214 F.Supp. 281, denying deposit of funds. *Fouch* v. *Rollins*, supra, was specifically mentioned and rejected in the opinion of the court of appeals below. (fn. 9).

have not been, but should be, settled by this Court. Hence, the criteria set out in Supreme Court Rule 19(1)(b) are met.

If the writ is granted, we believe that we shall be able to show that the court of appeals was in error in concluding that the district court was without authority to allow the deposit of funds.

This erroneous result was based upon two mistaken premises: *first*, that the moneys on deposit here are not disputed funds; and *second*, that, such being the case, the only method of tying up the funds was by Iowa attachment procedure, pursuant to Federal Rule of Civil Procedure 64 and Iowa Code, 1966, Chapter 639.

The court of appeals' assumption that this money indisputably belongs to the defendants is incorrect.

Under Iowa law, a defrauded purchaser has the right to set off the damages resulting from the fraud against the seller's claim for the purchase price; and if this purchase price be represented by an accumulated fund, then such fund belongs partly to the purchaser and partly to the seller, depending upon the amount of the purchase price and the amount of the purchaser's damages. *Coe* v. *Lindley*, 32 Iowa 437, 442-4; *Hail* v. *Crow*, 240 Iowa 81, 34 N.W.2d 195; *First Acceptance Corp.* v. *Kennedy*, (N.D. Iowa 1951), 95 F.Supp. 861, reversed on other grounds (8th Cir. 1952), 194 F.2d 819; 9 Drake Law Review 3, 4-6. The measure of damages in such a case is the difference between the actual value of the stock and its value as represented. *Smith* v. *Middle States Utilities Co.*, 224 Iowa 151, 275 N.W. 158. See also *Folkner* v. *Collins*, 249 Iowa 1141, 91 N.W.2d 545; *Bean* v. *Bickley*, 187 Iowa 689, 717, 174 N.W. 675, 686. (Counter claiming for damages "has precisely the effect of pleading payment of the contract obligation.") *cf. Hedinger* v. *Herweh*, 239 Iowa 1146, 34 N.W.2d 202, a case remark-

ably analogous to the present case. Here the Iowa court (applying the rule that a set off or counter claim is a defensive plea in the sense that it seeks to defeat or diminish plaintiff's recovery) held that funds deposited in court arising from the sale of chattels on which plaintiff was attempting to foreclose a mortgage, should be held until the court disposed of defendant's counter claim, notwithstanding the fact that the court had entered default against defendant on the notes held by plaintiff.

The problem involved in the present case falls squarely within Rule 67. This is an action in which part of the relief sought is "a judgment for a sum of money"—the damages claimed against the defendants. It is also an action for the "disposition of a sum of money"—the money tendered by United Forest. The defendants contend that this sum of money is payable under the contract; but United Forest disputes this, and claims that, out of this fund, it will be entitled to offset the damages resulting from the fraud. The Court's judgment will constitute the ultimate determination as to how much of this money shall be delivered to the individual defendants.

The court of appeals was equally incorrect in assuming that Iowa attachment procedure was the only means of withholding these funds, pending final disposition of the offsetting fraud claim. Its holding converts Rule 64 into a rigid jurisdictional limitation, when it was merely intended to be a rule incorporating by reference state practice and procedure as to certain provisional remedies. Rule 64 cannot take away from the powers that the court has under the Constitution and the applicable statutes, and its inherent powers as a court.

Courts, since their powers are equal to their duties, have inherent power to do everything necessary to carry

out the purposes of their creation.[9] The court has the power and the duty to issue such orders as are necessary to protect its own jurisdiction. Title 28, U.S.C., Section 1651, provides:

> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

This section has not been given any such narrow construction as given it by the court of appeals, nor does it take away from the inherent powers of the courts. See *Adams* v. *United States*, 317 U.S. 269, where Mr. Justice Frankfurter stated (317 U.S. at 273):

> "Unless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it."

This power enables federal courts to issue orders necessary to the conservation of the subject matter of the litigation.[10]

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9. *Knox County Council* v. *State*, 217 Ind. 493, 29 N.E.2d 405. Or, as stated in 20 *Am.Jur.2d, Courts*, Sections 78-9:

> "The phrase 'inherent powers' is used to refer to powers included within the scope of a court's jurisdiction which a court possesses irrespective of specific grant by constitution or legislation. Such powers can neither be taken away nor abridged by the legislature."
>
> * * *
>
> "'Courts have inherent power to do all things that are reasonably necessary for the administration of justice within the scope of their jurisdiction."

See also, *Ex Parte United States*, (7th Cir.) 101 F.2d 870, 878, where it is stated:

> "In the absence of prohibitive legislation courts have inherent power to provide themselves with appropriate procedures required for the performance of their tasks."

10. For example, in *United States* v. *Western Pennsylvania Sand & Gravel Assn.*, (W.D. Pa. 1953), 114 F.Supp. 158, the Court noted that the reference to "writs" in Section 1651 includes in-

The district court, in order to assure that its judgment, when rendered, would be meaningful and effective, had authority to enter an order for the conservation of disputed funds voluntarily tendered to it by one seeking to avoid a forfeiture. If the funds were distributed to and dissipated by the individual defendants during the progress of the litigation, the court's labors could well be an exercise in futility. Because of the unusual circumstance in the present case that the sums asserted by defendants to be due under the contract remained payable as of the time of the first deposit, and because of the threat of forfeiture in the event of non-payment, the district court properly responded to a unique opportunity to make the exercise of its jurisdiction effective and to preserve and protect the rights of all.

Moreover, the remedies listed in Federal Rule 64 are by no means exclusive. True, United Forest could have proceeded by way of attachment, but if another procedure for securing the funds pendente lite is available under state practice it is likewise available in federal court. In this connection, while no Iowa case involving facts identical to the present case has been found, voluntary deposits in Iowa courts are not uncommon, even though not specifically authorized by statute or rule.[11]

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junctions, and held that the court was empowered to enjoin the dissolution of a corporation against which certain charges were pending. The Court said (page 159):

> "The basic and underlying principle of law has long prevailed that a court by necessity has the power and authority to issue all writs and orders to preserve and maintain jurisdiction of the principal cause of action as well as the parties thereto. This doctrine has been deeply imbedded into a federal jurisprudence, and through the years has nurtured and fed lifeblood to the federal judicial organism."

11. For example, in *Rhea* v. *Brewster*, 130 Iowa 729, 107 N.W. 940, a purchaser had deposited with the clerk the balance due on a contract to buy land. And in *Shugart* v. *Pattee*, 37 Iowa 422 and *West* v. *Farmers' Mut. Ins. Co.*, 117 Iowa 147, 90 N.W. 523, it is held that, at law, a tender of performance on a contract to pay a sum of money can only be kept good, after suit is brought, by de-

This case is within the literal wording of Rule 67, and within the power that the federal courts have always had, inherently, and under Title 28, U.S.C., Section 1651. Federal Rule 64, making certain state auxiliary remedies available in federal court, does not qualify nor take anything away from Rule 67, nor does it place the federal court in a straitjacket of inelastic statutory state provisional remedies, such as attachment. Actually, as noted supra, a litigant in the Iowa courts could obtain the same relief as ordered by the district court below. The federal court has no less power to preserve the fund and to make its eventual judgment meaningful. Certiorari should be granted in order that this Court may make this clear, for the guidance of the district courts in the exercise of their powers under Rule 67.

Conclusion. Petitioner respectfully urges the Court that the issues tendered to the Court in this petition fully satisfy the considerations governing review on certiorari set out in Supreme Court Rule 19(1)(b), and that there are compelling reasons for granting this petition as to both points I and II discussed herein.

Respectfully submitted,

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positing the money in court. This procedure is so well accepted (although without specific statutory authority) that forms of pleading referring to a voluntary deposit in court are found in a standard Iowa text on pleading. 4 *McCarty, Iowa Pleading* (1953), Secs. 2951, 2953, pages 307-8.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 19,287

Earl R. Baxter, Willeyne Baxter, Lynn O. Muse, Richard L. King and W. K. Cash,
Appellants,
v.
United Forest Products Co., Inc.,
Appellee.

Appeal from the United States District Court for the Southern District of Iowa.

[February 3, 1969.]

Before GIBSON and LAY, Circuit Judges, and HARPER, Chief District Judge.

PER CURIAM.

This appeal arises from a district court's auxiliary order sequestering monies of the defendants in a federal diversity case without compliance with state law governing attachment. We find no authority for the action of the district court and vacate its order.

The facts show that in 1962 the defendants formed the Baxter Lumber Company and became its major stockholders. The company, which had plants in Iowa, Texas and Tennessee, engaged primarily in the assembling of ammunition boxes. The plaintiff, United Forest Products

Company, Inc., supplied pre-cut component parts of wooden boxes to the Baxter Company. Early in 1967 the parties commenced negotiations for the purchase of Baxter Lumber Company by United Forest. On April 24 of that year a final agreement was entered into whereby United Forest agreed to purchase the company for $2,180,000. Payment was to be made in four installments, ranging from $500,000 to $600,000 each. The contract also contained a forfeiture provision which provided that upon default of payment the plaintiff would lose all previous payments and return the stock and management of the company to the defendants. Under the contract plaintiff was required to put $500,000 working capital into the business the first year. This investment was also to be forfeited upon default.

Shortly before the first installment was due in August of 1967, United Forest brought suit in federal district court alleging fraud and misrepresentation by defendants in the sale of the lumber company. United Forest, stating that the forfeiture provisions made rescission impractical, affirmed the contract, but sought actual damages of $1,180,000 and exemplary damages of $1,000,000. Plaintiff then requested leave of court to deposit the first installment into the registry of the court alleging that some of the defendants were nonresidents, and that unless the monies were sequestered none of the defendants would ever be able to respond to plaintiff for damages

After an evidentiary hearing, the court determined that there existed evidence demonstrating misrepresentations of a substantial nature and, relying upon Fed. R. Civ. P. 67,[1] ordered all monies due and payable under the contract

1. Fed. R. Civ. P. 67 provides:

"In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of

to be deposited into the registry of the court. At the same time the court ordered plaintiff relieved from an attachment bond, but nevertheless required it to deposit an additional sum of $44,800 "which additional sum shall be held as security for such right of action, if any, as the individual Defendants might have under Iowa law for *wrongful attachment* . . ." (Emphasis ours.)

In November of 1967, defendants moved for disbursement of the funds. Plaintiff then requested leave of court to deposit the second installment, due December 31, 1968. After another hearing, the court held that the portion of the installment payments owed to three of the defendants would not be disbursed until decision of the case on the merits. The court also noted that since the plaintiff had made no direct allegations of fraud against the three other shareholders, they could not be charged with exemplary damages. He therefore ordered their shares of the first two installments to be disbursed, stating orally however, that their shares of the last two installments would be held. At the time of appeal the total amount of money paid into court was $691,200.[2]

Initially we must decide whether the district court's order is appropriate for appellate review. The district court properly refused to certify "that there is no just

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court, may deposit with the court all or any part of *such sum* or *thing*. Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of Title 28, U.S.C., §§ 2041, and 2042; the Act of June 26, 1934, c. 756, § 23, as amended, (48 Stat. 1236, 58 Stat. 845), U.S.C. Title 31, § 725v; or any like statute. As amended Dec. 29, 1948, effective Oct. 20, 1949." (Emphasis ours.)

2. This court was informed during the appellate argument that the total purchase price less the three shareholders' portions of the first two installments has now been paid into the court. This comes to a total of $1,791,200. No further security for a possible "wrongful attachment" other than the initial $44,800 has been required of the plaintiff. Additionally, the court ordered that all monies sequestered were to be deposited at the best interest rate obtainable.

reason for delay" under Fed. R. Civ. P. 54(b). This rule applies only to multiple claims, wherein there has been an adjudication of less than all claims and a party desire "finality" for purposes of appeal. Procedure for interlocutory appeal under 28 U.S.C. § 1292(b) (1966), was not followed and is not applicable. Nor does the off-shoot, "irreparable injury" rule of the *Forgay-Conrad*[3] case render the matter appealable. This rule relates only to the appealability of a partial adjudication of a single claim and is not applicable here.

If the court's order is reviewable at all, our jurisdiction can only be premised upon the so-called "collateral order" doctrine which disposes of a right auxilliary to the merits of a claim filed. The United States Supreme Court in *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47 (1949) stated that the appealability of a collateral order depends upon (1) whether the rights decided are collateral to the merits of the claim (cf. *Western Steel Erection Co.* v. *C. H. Leavell & Co.*, 384 F.2d 764 (8 Cir. 1967)), (2) whether the order is "too important to be denied review," (3) whether the order is "too independent of the cause itself" to defer appellate review until the whole case is decided, and (4) whether the order involves an adjudication of an important question of law or is only an exercise of the court's discretion. The above factors are to be weighed with Mr. Justice Frankfurter's statement in *DiBella* v. *United States*, 369 U.S. 121, 126 (1962), that under proper application the "collateral order" doctrine is applied "when the practical effect of the order will be irreparable by any subsequent appeal."

In focus is the specific question whether the court was correct in refusing to require plaintiff to post security under and otherwise adhere to the Iowa law of attachment

3. *Forgay* v. *Conrad*, 47 U.S. (6 How.) 201 (1848).

pursuant to Fed. R. Civ. P. 64.[4] If review of the court's authority to sequester funds were required to await appeal of the merits on protracted litigation,[5] compliance with the Iowa law of attachment would come too late to assure protection of the defendants' property rights involved. In order to attach monies before judgment the Iowa Code requires (1) that in a non-contract action the amount attached must be approved by a court of competent jurisdiction,[6] (2) that plaintiff demonstrate statutory grounds for such attachment,[7] and (3) that a bond be required in an amount double

4. Fed. R. Civ. P. 64 provides:

"At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action."

5. This case was filed on August 7, 1967, and has yet to come to trial.

6. Iowa Code Ann. § 639.8 (1950). Under the Iowa law of attachment, if the suit is founded on a contract, the court will permit a levy upon property only fifty per cent greater in value than the amount alleged to be due. Iowa Code Ann. §§ 639.6 & 639.7 (1950).

7. Iowa Code Ann. § 639.3 (1950) provides:

"The petition or amendment to petition which asks an attachment, must in all cases be sworn to. It must state one or more of the following grounds:

"1. That the defendant is a foreign corporation or acting as such.

"2. That he is a nonresident of the state.

"3. That he is about to remove his property out of the state without leaving sufficient remaining for the payment of his debts.

the value of the property to be attached.[8] The policy reasons behind these statutory provisions are self-evident. Under Iowa law the amount of the attachment bond was not left to the discretion of the trial judge. The legislature required a bond double the value of the property attached not only as protection to the property owner but undoubtedly as an added deterrent to those who seek to attach property upon a mere statement of a contingent claim. See discussion in n. 10, infra. Of particular significance is the prerequisite of judicial approval as to the amount to be attached in a tort action, as involved here. Under Iowa law a party cannot arbitrarily govern the amount attached by

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"4. That he has disposed of his property, in whole or in part, with intent to defraud his creditors.

"5. That the defendant is about to dispose of his property with intent to defraud his creditors.

"6. That he has absconded, so that the ordinary process cannot be served upon him.

"7. That he is about to remove permanently out of the county, and has property therein not exempt from execution, and that he refuses to pay or secure the plaintiff.

"8. That he is about to remove permanently out of the state, and refuses to pay or secure the debt due the plaintiff.

"9. That he is about to remove his property or a part thereof out of the county with intent to defraud his creditors.

"10. That he is about to convert his property or a part thereof into money for the purpose of placing it beyond the reach of his creditors.

"11. That he has property or rights in action which he conceals.

"12. That the debt is due for property obtained under false pretenses."

8. Iowa Code Ann. § 639.11 (1950) provides:

"In all cases before it can be issued, the plaintiff must file with the clerk a bond for the use of the defendant, with sureties to be approved by such clerk, in a penalty at least double the value of the property sought to be attached, and in no case, except in a class B case in municipal court, less than two hundred fifty dollars in a court of record, or less than fifty dollars if in a justice court or a class B case in municipal court, conditioned that the plaintiff will pay all damages which the defendant may sustain by reason of the wrongful suing out of the attachment."

inflating the prayer for damages in the complaint. The value of the property attached must have some realistic relationship to the damages theoretically sustained.

The issue here is not one related to the proper exercise of the court's discretion as to the amount of security to be posted. The question which makes this matter reviewable is whether the law permits a trial court to circumvent the Iowa law of attachment altogether. A similar issue of review was involved in the *Cohen* case where the district court had refused to apply New Jersey law requiring security for costs in a stockholders derivative action. Cf., e.g., *Swift & Co. Packers* v. *Compania Colombiana Del Caribe,* 339 U.S. 684 (1950) (reviewed order vacating attachment); *Phelps* v. *Burnham,* 327 F.2d 812 (2 Cir. 1964) (reviewed order requiring the posting of security); *McDonnell* v. *Birrell,* 321 F.2d 946 (2 Cir. 1963) (reviewed order requiring party to make payments, to determine whether order conformed with requirements of state law).

We find the district court's order is reviewable under the *Cohen* rule. We now consider the merits.

Plaintiff seeks to avoid Rule 64 by reasoning that sequestering the funds did not involve "attachment" because the funds were never owned by the defendants. This argument is inconsistent with its asserted action. If the money does not belong to defendants, plaintiff has defaulted in its payment and is subject to the forfeiture terms of the contract. However, plaintiff has specifically elected to affirm the contract and has deposited the installment payments into court in order to avoid the forfeiture provision of the contract. Plaintiff cannot pursue inconsistent forms of relief to the prejudice of the defendants. See *Myzel* v. *Fields,* 386 F.2d 718, 740 n. 15 (8 Cir. 1967). Upon plaintiff's election to affirm the contract, the money paid under the contract legally belongs to the defendants. The fact

that the money has been paid into the registry of the court does not deprive the defendants of ownership of the funds, since the court merely holds the money as trustee for the rightful owner. See *In re Moneys Deposited*, 243 F.2d 443, 445 (3 Cir. 1957). Plaintiff has no recognizable interest remaining in those funds. Mere allegations of tortious injury cannot give plaintiff any specific interest in defendants' property. Plaintiff at this juncture is not entitled to any kind of lien, equitable or otherwise, on said monies which could place its interest above that of defendants' general creditors. At this point, plaintiff does not even enjoy the status of a general creditor. The district court itself tacitly recognized that the funds belonged to the defendants by disbursing a small portion of it to some of the defendants and by requiring plaintiff to post a $44,800 bond in case the defendants wished to sue for wrongful attachment.

Fed. R. Civ. P. 64 governs seizure of a person's property in a federal diversity action. The Advisory Committee comment on Rule 64 relates to the necessary application of state law in discussing the origin of the rule:

> "This rule adopts the existing federal law, except that it specifies the applicable state law to be that of the time when the remedy is sought. Under U.S.C.A., Title 28, former § 726 (Attachments as provided by state laws) the plaintiff was entitled to remedies by attachment or other process which were on June 1, 1872, provided by the applicable state law, and the district courts might, from time to time, by general rules, adopt such state laws as might be in force. This statute is superseded as are district court rules which are rendered unnecessary by the rule."

The "existing law" refers to the Conformity Act of 1872 which provided that in all cases at common-law, the procedure as to "attachment or other process should conform

to the state practice." See *Big Vein Coal Co.* v. *Read*, 229 U.S. 31, 36 (1913). Thus, with respect to such provisional remedies the federal courts are required to apply state law. See, e.g., *Bernstein* v. *Van Heyghen Freres Societe Anonym*, 163 F.2d 246 (2 Cir. 1947); *General Elec. Credit Corp.* v. *Waukesha Bldg. Corp.*, 259 F.Supp. 958 (W.D. Ark. 1966); *Hisel* v. *Chrysler Corp.*, 90 F.Supp. 655 (W.D. Mo. 1950); 7 Moore, Fed. Practice ¶ 64.01-.09 at 1501-07 (2 ed. 1966). Rule 64, however, does make state law subject to any existing statute of the United States which might be applicable.

The question then is whether there exists any applicable federal statute which authorized the district court's action. The trial court relied upon the "literal" language of Rule 67. The history of Rule 67, however, demonstrates that it is not intended as an "equitable" alternative to the applicability of state law under Rule 64. Rule 67 was intended to apply only to a fund that is in dispute. See discussion in *United States* v. *Balfour, Gutherie & Co.*, 192 F.Supp. 60 (S.D.N.Y. 1961). When a disputed *res* or "sum of money" is deposited into the registry, the court holds the money in trust; it is "held for the benefit of whomsoever in the end it should be found to belong," *Branch* v. *United States*, 100 U.S. 673, 674 (1879). However, here the seized money is not in contest. Plaintiff's election to sue in tort and keep the bargain confirms this. The plaintiff seeks relief from material misrepresentation which has caused it damage since its bargain retained allegedly is less valuable than was represented. The damage, if any, *arises out of* the alleged excess consideration paid on the contract; the damage is not *the* consideration itself, since the bargain has been affirmed and rescission has not been elected. Plaintiff simply wants its bargain and its money too. At the same time it seeks to deprive defendants of

their right to claim forfeiture or to sue for a breach of contract. Cf. *General Pencil Co.* v. *George N. Kahn Co.*, 246 F.Supp. 60 (S.D.N.Y. 1965); *Dinkins* v. *General Aniline & Film Corp.*, 214 F.Supp. 281 (S.D.N.Y. 1963). Rule 67 was not intended for such a one-sided before-judgment consequence.[9]

The sole question remaining is whether the court has an "inherent power" to allow the plaintiff to deposit the monies into court. Argument is made from cases relying upon the All Writs statute, 28 U.S.C.A. § 1651(a) (1966), which reads:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

However, these cases and statute are not helpful here. This statute was not intended to be used to subvert the specific requirements governing attachment under state law. Section 1651 relates only to writs "agreeable to . . . principles of law." This brings us directly back to Rule 64. In *De Beers Consol. Mines* v. *United States*, 325 U.S. 212 (1945), which involved an analogous situation, the government sought a preliminary injunction under § 262 of the Judicial Code which preceded § 1651(a). The injunction sought restraint from withdrawal by defendant foreign corporations of any properties located in the United States of America and from "selling, transferring or disposing" of any of its properties until the determination of the merits of the suit. The complaint sought equitable relief under the Sherman Act and the government claimed the injunction necessary to enforce the court's ultimate decree. The district court

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9. The plaintiff relies upon *Fouch* v. *Rollins*, 146 F.Supp. 87 (D.C. Alaska 1956). For the reasons stated in the opinion we do not accept the *Fouch* case in this Circuit.

entered the injunction. The Supreme Court vacated the same. The government admitted Rule 64 inapplicable because under New York law attachment could only issue in an action at law. However, the concluding remarks of Mr. Justice Roberts demonstrate, we feel, the error of the district court in the instant case:

> "To sustain the challenged order would create a precedent of sweeping effect. This suit, as we have said, is not to be distinguished from any other suit in equity. What applies to it applies to all such. Every suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods, impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree. *And, if so, it is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction sequestrating his opponent's assets pending recovery and satisfaction of a judgment in such a law action. No relief of this character has been thought justified in the long history of equity jurisprudence.*" 325 U.S. at 222. (Emphasis ours.)

The effect of plaintiff's action here is to obtain such a "so-called injunction" for an action at law. The situation is no different than if defendants were paid the monies directly and then were enjoined from "disposing" of them until the determination of the merits. Provisional remedies of attachment before judgment were not recognized at common law. They are statutory remedies in derogation of the common law and strict compliance with the statutory requirements is therefore necessary.[10] However, even more

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10. The Iowa court reviewed its earlier statements in *Olds* v. *Olds*, 261 N.W. 488, 490-91 (Iowa 1935):

> " 'It is a well-established rule that attachment proceedings are in derogation of the common law.

cogent is the fact that before a person's property can be sequestered, basic principles of due process require adherence to recognized legal standards.

" 'In *Eads* v. *Pitkin*, 3 G. Greene, 77, at page 83, this court said: "Having resorted to this mode of procedure it was incumbent on him to comply with the provisions of the attachment law of the state by filing the affidavit therein prescribed, and giving the bond required by that law, before the issuing of the writ. By simply providing that the complainant might proceed in his action by attachment, without prescribing any special mode of procedure different from that which is set forth in the general attachment law of the state, it must be presumed that it was the intention of the legislature that the requirements of that law should be observed, and strictly pursued. The proceeding by attachment being extraordinary in its nature, and designed for application to secure the ends of justice in cases specified, and when the ordinary process of law would be unavailing, it is not presumable that the legislature would have authorized a plaintiff to resort to it without protecting the interests of the defendant by the usual and necessary guards. To adopt such a presumption would be in contravention of the most manifest principles of reason and right. It would expose a party defendant to a ruinous sacrifice of his property and effects, at the mere will of an attaching complainant. Such a presumption of legislative design would be violent indeed."

" 'And in *Tiffany* v. *Glover*, 3 G. Greene, 387, at page 390, this court, referring to an attachment proceeding, said:

" ' "The proceeding being in derogation of the common law, and of a violent character, it should affirmatively appear by the officer's return, that the provisions of the statute had been strictly observed, as the jurisdiction of the court over the property depends entirely upon a legal levy. * * *

" ' "In proceedings in attachment, the jurisdiction of the court is obtained by special authority, derived from the legislature, and hence the doctrine of presumption, as applicable to courts in the exercise of common law powers, cannot apply."

" 'The late Justice DeGraff, speaking for this court in *Edwards* v. *Tracy*, 203 Iowa 1083, at page 1084, 212 N.W. 317, 318, said: "Proceedings in attachment are ancillary or auxiliary to the main action and are statutory, being unknown to the common law. *Curry* v. *Allen*, 55 Iowa 318, 7 N.W. 635; *Eads* v. *Pitkin*, 3 G. Greene, 77; *Delaplain & Co.* v. *Armstrong & Ulrich*, 21 W.Va. 211; *Penoyar* v. *Kelsey*, 150 N.Y. 77 44 N.E. 788, 34 L.R.A. 248. An attachment is not the leading process. Its only office is to hold the property attached under it for the satisfaction of plaintiff's demand. In a sense, it is an execution by anticipation. It is in derogation of the common law, but, under our statute, the proceedings are to be liberally con-

One reason plaintiff urged sequestering defendants' funds during the pendency of the claim was its concern for defendants' bankruptcy. Plaintiff's action in retaining the business sold and depriving defendants of the consideration during pendency of the litigation would almost guarantee this ominous result. The law does not recognize such leverage in the hands of litigants.

Judgment reversed with directions to vacate the court's order in conformity with this opinion.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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strued. Section 12143, Code 1924. A court, however, cannot proceed by attachment unless the power rests upon express statutory sanction."

"'Attachment proceedings are wholly statutory and we must look to the statute to find when an attachment may issue. A court of equity has no general jurisdiction to order an attachment without bond. . . .'"